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Legislative Council

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(These minutes have been seen by the Administration and cleared with the Chairman)

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Subcommittee on
Regulations relating to Occupational Safety and Health

Minutes of Meeting
held on Wednesday, 8 March 2000 at 9:00 am
in Conference Room A of the Legislative Council Building

Members Present	:	Hon Andrew CHENG Kar-foo (Chairman) Hon HO Sai-chu, SBS, JP Hon Michael HO Mun-ka Hon LEE Cheuk-yan Hon LEE Kai-ming, SBS, JP Hon Ronald ARCULLI, JP Hon CHAN Wing-chan Hon TAM Yiu-chung, GBS, JP
Member Absent	:	Hon Cyd HO Sau-lan Dr Hon LUI Ming-wah, JP Dr Hon LEONG Che-hung, JP
Public Officers Attending	:	Mr LAM Kam-kwong Principal Assistant Secretary for Education and Manpower Mr Samson LAI Assistant Secretary for Education and Manpower Dr LEUNG Lai-man Occupational Health Consultant, Labour Department Mr J D SCOTT Senior Government Law Draftsman Department of Justice

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		Ms Anastasia KWONG Senior Government Counsel, Department of Justice
Clerk in Attendance	:	Mrs Constance LI Chief Assistant Secretary (2) 2
Staff in Attendance	:	Mr Arthur CHEUNG Assistant Legal Adviser 5
		Miss Betty MA Senior Assistant Secretary (2) 1

I. Meeting with the Administration
[Paper Nos. CB(2)1094/99-00(01)-(02) and CB(2)1032/99-00(01)-(02)]

Sections 13 &14 - Appeal Board

Members noted that the Administration had tabled some amendments to section 14 of the Factories and Industrial Undertakings (Medical Examinations) Regulation [Paper No. CB(2)1302/99-00(02)] in respect of the power of the Appeal Board. Principal Assistant Secretary for Education and Manpower (PAS(EM)) said that the Administration agreed to Mr Ronald ARCULLI's previous suggestion that a proprietor should also be allowed to make an appeal to the Appeal Board against a recommendation made by an appointed medical practitioner (AMP). In reply to Mr ARCULLI, PAS(EM) said that the Administration had not consulted the industry on the proposed amendment because the amendment only aimed at providing equal opportunities for both proprietors and employees to make appeals to the Appeal Board. No new obligation was imposed on proprietors.

2. On the power of the Appeal Board, PAS(EM) said that following discussion with the Department of Justice and based on the operational experience of Labour Department, the Administration considered it necessary that the Board should have power to make new recommendation other than upholding or revoking the original recommendation.

3. In response to the Chairman, Assistant Legal Adviser 5 (ALA5) advised that the drafting of new section 13 mirrored that of the old section 13 (now new section 14). Nevertheless, he drew members' attention to new section 13(3) which provided that when a proprietor made an appeal and if the employee failed to undergo another medical examination as recommended by the Appeal Board,

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the appeal by the proprietor would be deemed allowed. In response to ALA5, Occupational Health Consultant of Labour Department (OHC/LD) clarified that the Appeal Board would ask an employee to undergo another medical examination only if the Board had doubts on a recommendation of an AMP. It was therefore proposed under the new section 13(3) that should an employee refuse to comply with the medical re-examination requirement without reasonable excuse, the appeal by the proprietor would be regarded as allowed.

4. Senior Assistant Law Draftsman (SALD) explained that the Appeal Board was tasked to review an AMP's recommendation under appeal and might require the employee to undergo another medical examination. However, if the employee concerned refused to attend the re-examination, the Appeal Board could not proceed further.

5. Mr HO Sai-chu considered the amendment acceptable because the Appeal Board would only require a second medical examination of the employee when there were sufficient grounds for doing so. It was therefore reasonable to treat the appeal made by the employer as allowed if the employee refused to co-operate.

6. Mr LEE Cheuk-yan sought clarification on the medical re-examination arrangements. He asked which party would have the authority to appoint an AMP to conduct the medical re-examination and who should bear the medical re-examination expenses. He was concerned that if the proprietor who made the appeal could appoint an AMP for the re-examination, the employee might consider the re-examination unfair and would make further appeals.

7. SALD pointed out that section 6 of the proposed Regulation required that all medical examinations arranged and conducted for the purpose of the Regulation would be at the expense of the proprietor, and it covered also medical re-examinations.

8. OHC/LD added that the medical re-examination would not be conducted by the same AMP who conducted the first medical examination. As the Appeal Board comprised an Occupational Health Consultant and two other medical practitioners appointed by the Commissioner for Labour, it was likely that medical re-examinations would be conducted by a member of the Appeal Board or an Occupational Health Officer of Labour Department (LD).

9. Mr LEE Cheuk-yan pointed out that under the new sections 13(2) and 14(2), the Appeal Board would review an AMP's recommendation and determine whether an employee should be medically re-examined under section 8. However, section 4 of the Regulation provided that an AMP would be appointed by the proprietor for the purpose of the Regulation. He therefore questioned whether section 4 or section 8 should apply to medical re-examination.

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10. The Chairman remarked that the current drafting of the new sections 13 and 14 did not adequately reflect the legislative intent. If it was the intention that the Appeal Board would appoint medical practitioners (other than the AMPs) to conduct medical re-examinations, the Administration should amend the relevant sections to that effect.

11. Mr Michael HO added that the Administration should also issue guidelines on the procedures to ensure that there would be no conflict of interest in the medical re-examination arrangements. Mr Ronald ARCULLI shared similar concerns. Mr ARCULLI did not agree that a member of the Appeal Board should be appointed to carry out the medical re-examination as this would undermine the independence of the Appeal Board. He suggested that there should be a pool of qualified medical practitioners who would be selected to carry out medical re-examinations on a rotation basis. To ensure fairness to all parties, the medical practitioners on the list should not be appointed as members of the Appeal Board.

12. OHC/LD said that according to section 15 of the proposed Regulation, the practices and procedures for considering an appeal would be determined by the Appeal Board. The Appeal Board would appoint medical practitioners to conduct medical re-examinations with regard to the medical expertise required in individual cases. He added that the Regulation would be amended to specify the

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required professional expertise of the two medical practitioners to be appointed as members of the Appeal Board for the purpose of section 15.

13. The Chairman advised the Administration to consider improving the new sections 13(2) and 14(2) to provide for an independent, fair mechanism for appointing medical practitioners to conduct the medical re-examinations. This would also remove any misunderstanding that the proprietor could select an

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AMP for the medical re-examination in an appeal case. PAS(EM) agreed to consider the suggestion.

14. Responding to Mr LEE Kai-ming, OHC/LD explained that the employee could make representation to the Appeal Board giving reasons for his not taking the medical re-examination, before the Appeal Board took a decision on whether to allow an appeal.

15. Mr TAM Yiu-chung envisaged that proprietors would seldom make appeals as the medical report would be made by an AMP appointed by the proprietor. Nevertheless, he was concerned that the medical re-examination arrangements, such as repeated x-ray checks, might be unfair to employees. He shared the concern that the Regulation should provide a fair mechanism for the selection of medical practitioner for conducting the re-examination and that a reasonable excuse should be provided for an employee in not taking the medical re-examination.

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16. PAS(EM) responded that in the case of the construction industry, the medical examinations were arranged through the Construction Industry Training Authority instead of the proprietor and therefore proprietors might not agree with the AMP's recommendation. The amendment was to provide a mechanism for the proprietor to make appeals if he did not agree with any of the AMP's recommendations. As the legislative intent was to provide better protection of the occupational health and safety of workers, no statutory obligation was proposed in the Regulation in respect of the employee's compliance with the medical examination requirements.

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17. In view of members' concerns, the Chairman requested the Administration to reconsider the appointment of medical practitioners for re-examination and inclusion of a reasonable excuse for an employee to refuse re-examination under the new sections 13(3) and 14(3).

18. Referring to section 12(1) of the draft Regulation, Mr Ronald ARCULLI sought clarification whether implementation of a recommendation which was the subject of appeal would be regarded as suspended pending a decision of the Appeal Board. He said this should be expressly stated in the Regulation.

19. SALD explained that under section 12, a proprietor had the responsibility to implement the recommendation or to make an appeal otherwise within 14 days after receipt of the recommendation. If a proprietor appealed against the recommendation in accordance with the new section 13, the recommendation would not be implemented pending the outcome of the appeal.

20. Mr Ronald ARCULLI reiterated that the Regulation should spell out the intention that an AMP's recommendation would not be implemented when the case was under appeal. He further pointed out that there was no penalty clause on employees' non-compliance with the AMP's recommendation. For example, the employee might refuse to take rest as recommended by an AMP but seek to work for another employer during the period of suspension. It would then pose difficulties on proprietors who had the legal responsibility to comply with the AMP's recommendations. He opined that the Administration should consider the policy aspects of such arrangement.

21. OHC/LD said that the proposed Regulation aimed to better safeguard the occupational safety and health of employees through regular medical examinations. A worker would put his health at risk if he refused to undergo a medical examination. The Chairman added that the employee would still need to produce the medical certificate if he sought to work for another employer in the specified occupation.

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22. To address Mr ARCULLI's concern, the Chairman requested the Administration to consider whether a penalty clause should be introduced for non-compliance by the employee.

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Proposed amendments to section 12 on the re-deployment arrangement
[Paper No. CB(2)1094/99-00(02)]

23. The Chairman informed members that, at the request of the Subcommittee, ALA5 had prepared draft amendments to section 12 to require proprietors to arrange re-deployment of an employee who was recommended temporary suspension by an AMP. ALA5 said that he had prepared two sets of amendments on the proposed requirement for a proprietor to arrange redeployment, as far as reasonably practicable, of an employee during the period of suspension. Option Two of the draft amendments contained a penalty clause for non-compliance by the employer, while Option One did not have a penalty clause. In response to members, ALA5 confirmed that Option One as such would be difficult to enforce.

[*At this juncture, Mr LEE Cheuk-yan took the chair during the temporary absence of the Chairman.]*

24. Mr Ronald ARCULLI disagreed with the proposed amendments. He was of the view that the mandatory re-deployment arrangement would lead to numerous disputes because some employees might not accept the re-deployment. While Mr ARCULLI agreed that the employer should assist in re-deployment arrangement as far as possible, he considered that such a mandatory requirement would pose difficulties on small establishments. He said that it would be meaningless to introduce an amendment which was not enforceable. He therefore strongly urged the Subcommittee to consult the employers' and employees' associations on the proposed amendments in view of the significant implications.

25. Mr Michael HO said he did not support the inclusion of a penalty clause for the re-deployment arrangement although he agreed that a proprietor should arrange, as far as reasonably practicable, a change of post for the worker during the period of suspension.

26. Mr LEE Cheuk-yan said that the proposed amendment was only to provide a mechanism to implement an AMP's recommendation where an employee was not granted sickness days during temporary suspension. In this connection, he invited members' attention to the response from the Hong Kong College of Community Medicine [Paper No. CB(2)1094/99-00(01)] on the granting of sickness days. He also asked the Administration whether it had changed its position on the proposed re-deployment requirements.

27. PAS(EM) said that from the policy point of view, it would be difficult, if not impossible, to impose on a proprietor an obligation that was beyond the proprietor's capability. He considered it impractical to set out in law a requirement for an employer to arrange re-deployment for his employee as the

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circumstances in each case would vary. The introduction of a penalty clause for re-deployment arrangement would further complicate the issue. He emphasized that the spirit of the legislation was to provide better protection of the safety and health of an employee through medical examinations, and the proposed amendments were beyond the scope of the proposed Regulation. He added that the proposed amendment would also have enforcement problems.

28. Mr LEE Cheuk-yan maintained the view that the Regulation should contain provisions on the redeployment arrangement where an employee was recommended by an AMP as medically unfit for employment in a specified occupation but no sickness days were granted. He further suggested that the Regulation could be amended to the effect that if re-deployment was not possible, the employee should automatically be granted paid sickness days.

[The Chairman resumed the chair at this juncture.]

29. The Chairman noted that the Administration had not changed its position on the proposed re-deployment arrangement. He also noted that some members had reservations about Option Two which contained a penalty clause. Mr ARCULLI said that he strongly opposed the two options of the proposed amendments as the industry had not been consulted.

The way forward

30. In view of the comments made by members and the Administration, the Chairman advised that the Subcommittee should consult the employers' and employees' associations and the Labour Advisory Board on Option One (without the penalty clause) of the proposed amendment.

(*Post-meeting note* : Letters inviting views on the proposed amendments were sent to the employers' and employees' associations and the Labour Advisory Board on 9 March 2000.)

II. Any other business

31. The Subcommittee agreed to hold the next meeting on 11 April 2000 at 10:45 am.

32. There being no other business, the meeting ended at 10:30 am.

Legislative Council Secretariat
24 July 2000